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I. Introduction

Throughout the history of the United States, various Presidents have relied upon their inherent powers to justify action they believed was for the good of the nation.[1] In order to do what they thought best, they have acted in ways resulting in an expansion of their powers beyond those explicitly granted to them through either the Constitution or any statute. This oft-repeated expansion of presidential power in times of crisis begs the question whether these actions have amounted to a true *expansion* of presidential powers, or were instead merely a part of some kind of ancillary, "inherent" power, held by the President solely due to his status as the chief executive officer. This Comment will examine the so-called "inherent" powers of the president, beginning with an exploration of historical ideas about inherent powers, such as those of the founders and pre-founding thinkers. The Comment will then analyze the thoughts of various presidents concerning the existence of inherent powers before moving on to an analysis of relevant case law addressing inherent powers. Next, the Comment will discuss *American Civil Liberties Union v. National Security Agency*, a recent federal court decision in which a district judge roundly struck down the notion of inherent presidential powers.[2] Combining all these sources, the Comment will finally analyze

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1. *See* 88 CONG. REC. 7044 (1942). *See generally* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952); Abraham Lincoln, Message to Congress in Special Session, (July 4, 1861), http://teachingamericanhistory.org/library/index.asp?document=1063.

2. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006) [hereinafter *ACLU*].

the existence of inherent powers and establish a framework for understanding inherent powers in this day and age.

In order to adequately discuss inherent powers, one must first determine what is meant by the term "inherent powers." *Black's Law Dictionary* defines "inherent power" as "a power that necessarily derives from an office, position, or status."[3] To elaborate further, this is a power that is not explicitly delegated to an office, position, or status; instead, it merely exists as a necessity to the execution of an office. This Comment will utilize Black's definition of "inherent power," with a specific emphasis on the powers of the President. Essentially, "inherent power" under this framework means an implicit power necessarily granted to the President through the Vesting Clause,[4] the Take Care Clause,[5] and the Presidential Oath to "preserve, protect, and defend the constitution of the United States."[6]

II. Historical and Contemporary Thoughts on Inherent Powers

A. Pre-Founding Thought

Dating back as early as Plato's *Republic*, philosophers have concerned themselves with the appropriate scope of executive powers.[7] One political theorist of particular relevance is John Locke, who set forth his notion of executive power nearly a century before ratification of the Constitution.[8] In his *Second Treatise on Government*, Locke spoke of three kinds of power possessed by the executive department.[9] He found that laws have a "constant and lasting force" and need "perpetual execution;" therefore, there must be a "power always in being" to see to the execution of the laws.[10] This first power is essentially akin to the "law-enforcement" view of the executive:[11] the President exists to carry out congressional mandates.[12] Locke went on to speak of what he termed

3. BLACK'S LAW DICTIONARY 1208 (8th ed. 2004).

4. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

5. "[H]e shall take Care that the Laws be faithfully executed." *Id.* § 3.

6. *Id.* § 1.

7. *See generally* PLATO, REPUBLIC, *in* PLATO COMPLETE WORKS 971 (John M. Cooper, ed., 1997).

8. *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV 1, 12 (1992) (comparing the Lockean understanding of presidential powers to the American understanding of presidential powers) [hereinafter Monaghan].

9. *See* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 76 (C.B. Macpherson ed., 1980).

10. *Id.*

11. Monaghan, *supra* note 8, at 12.

12. *Id.* at 3 (arguing that the Constitution only establishes a law enforcement

the "federative" power, which "contains the power of war and peace, leagues and alliances, with all persons and communities without the commonwealth. . . ."[13] This second power directly correlates to Section 2 of Article II, where the President's commander-in-chief, treaty making, and administrative powers are outlined.[14]

Finally, Locke described what he called the "prerogative power," which he stated is the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."[15] This statement seems to encompass what is meant by the inherent powers of the President—acting according to discretion for the public good without explicit statutory or constitutional mandate. Locke further supported this notion when he wrote that "prerogative is nothing but the power of doing public good without a rule."[16] Essentially, Locke seemed to support the doctrine of inherent powers, when he determined that in governments the lawmaking power is often too slow, or not always in being,[17] which therefore necessitates a quick-acting body to take the necessary action.[18] Thus, Locke strongly believed in the need for inherent power of the executive, even arguing that this power may sometimes enable the executive to act *contrary* to the law.[19]

B. Thoughts of the Founders

The most obvious method to ascertaining the thoughts of the Founders on Constitutional issues is through *The Federalist Papers*. Comprising a series of published essays written individually by Alexander Hamilton, John Jay, or James Madison, *the Federalist Papers* arose during the constitutional ratification process as a defense to the Constitution.[20] It provides a unique insight into the thoughts of the Framers as they energetically defend their proposed government.

The Federalist Papers speak to the need for a vigorous executive. "[E]nergy in the executive," Hamilton wrote, "is a leading character in the definition of good government."[21] Hamilton primarily seemed to be

executive).

13. LOCKE, *supra* note 9, at 76.

14. *See supra* note 4, § 2.

15. LOCKE, *supra* note 9, at 84.

16. *Id.* at 87.

17. This could aptly be compared to our congressional sessions, where the law making power is sometimes in hiatus.

18. *See* LOCKE, *supra* note 9, at 84.

19. *See id.*

20. CHARLES KESLER, THE FEDERALIST PAPERS vii, vii-viii (Clinton Rossiter ed., 1999) [hereinafeter KESLER, THE FEDERALIST PAPERS].

21. Alexander Hamilton, The Federalist No. 70 (1788), *in* KESLER, THE FEDERALIST PAPERS, at 421.

speaking of the execution and administration of laws and defense of the country,[22] all areas specifically enumerated within the Constitution. What is more telling, though, is the *absence* of any mention of presidential prerogative, inherent power, or any sort of indication that the President has any power not explicitly stated within the Constitution.[23] Though Hamilton spoke of an energetic executive, the executive may presumably be energetic while acting only within the limits of those powers specifically delegated to him or her by the Constitution.

Even more informative on this account is the actual record of the Constitutional Convention. Madison's studious notes reveal that he himself suggested adding a clause to Article II allowing the President to "execute such Powers, not legislative nor judiciary in their nature, as may from time to time be delegated by the national legislature."[24] This measure was rejected by the members of the convention.[25] Implicit in this rejection is the notion that the Founders so wished to limit the President's powers that they hesitated to even allow him to exercise additional power *conferred on him by Congress*. One could hardly argue that, after imposing this limitation, the Founders would have wanted the President to have countless intangible powers merely due to his office.[26]

C. *Presidential Thought*

As mentioned previously, several Presidents have invoked the doctrine of inherent powers in order to justify actions they have taken during times of national crisis.[27] Others have merely spoken hypothetically about the existence of a power to act either in the absence of a congressional mandate, or even contrarily to it.[28] One of the earliest Presidents to opine on the inherent powers of the chief executive was

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22. *See id.* at 421-22.

23. *See generally id.*

24. 1 Records of the Federal Convention of 1787, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr00134)).

25. *See id.*

26. Obviously, this logic is not without its flaws. One cannot place too much credence in the *inaction* of legislative bodies, without overwhelming proof that the failure to act was due to the particular reason stated. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983). Therefore, without knowing more about specifically why the measure was rejected, one should be hesitant to place much weight on the significance of its rejection as evidence of legislative thought.

27. *See generally* Lincoln, *supra* note 1; *see also* Steel Seizure, 343 U.S. at 584; 88 Cong. Rec. 7044.

28. *See generally Letter from Thomas Jefferson to John B. Colvin*, A LAW BEYOND THE CONSTITUTION (Sept. 20, 1810), http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=204&division=div1; Interview with Richard Nixon, Former President of the United States, N.Y. TIMES, May 20, 1977, at A16.

Thomas Jefferson. In a letter to a contemporary, Jefferson spoke of the need of those "who accept great charges" to "risk themselves on great occasions" when the welfare of the country, or other such lofty interests were at stake.[29] Jefferson went on to say that a good officer should draw the line between strict obedience to orders, and transgressing them for the greater good, at his own risk, with hopes that the public will support his action.[30] Though obedience to laws is important, Jefferson argued, "the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[31] Implicit within these statements is the condition that the officer has the *power* to act contrary to the law when it is, in his estimation, for the public good. As Jefferson did not speak on the delegation of this power, one can only conclude that it is inherent in one's status as a "good officer," or, as he states earlier in the letter, the "Executive of the Union."[32]

Abraham Lincoln similarly advocated the ability of the President to act contrarily to the law during times of national emergency.[33] During the Civil War, Lincoln greatly infringed upon individual rights through conscription, arrests, and suspension of habeas corpus.[34] In order to justify acting in contravention of positive law, Lincoln addressed Congress in Special Session in 1861.[35] Identifying and defending his actions, Lincoln asked them, should "all the laws, but one . . . go unexecuted, and the government itself go to pieces, lest that one be violated?"[36] As the majority of laws were not being executed in nearly one-third of the states, Lincoln argued that the breaking of a few laws was justified in order to save the nation.[37] Though the Constitution itself speaks to powers to be executed in case of an emergency (such as the suspension of habeas corpus), it is silent with regard to who should execute them.[38] As such, Lincoln found it absurd that the Framers intended that whatever threat was facing the nation should continue until Congress could be convened to act upon it.[39] The President must have the power to act in such times, even though such powers have not been explicitly delegated to him by statute or the Constitution.[40]

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29. *Letter from Thomas Jefferson*, *supra* note 28.
30. *See id.*
31. *Id.*
32. *See id.*
33. *See* Monaghan, *supra* note 8, at 27 (citing JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 36-37 (1926)).
34. *See id.*
35. *See id.*
36. Lincoln, *supra* note 1
37. *See id.*
38. *See generally* U.S. CONST. art. I, § 8.
39. *See* Lincoln, *supra* note 1.
40. *See id.*

While Lincoln acted first, and then justified his actions to Congress, President Roosevelt acted in the inverse manner, demanding that Congress repeal certain provisions of the Emergency Price Control Act in 1942,[41] arguing that he would act if Congress failed to do so.[42] Like Lincoln and Jefferson before him, Roosevelt also believed in the idea of inherent presidential powers, as evidenced by his statement that "[t]he President has powers, under the Constitution and under congressional acts, to take measures necessary to avert disaster to interfere with the winning of the war."[43] He went on to swear that he would use every power vested in him to accomplish this end.[44] As Congress acquiesced to his request and repealed the necessary aspects of the Emergency Price Control Act,[45] Roosevelt did not use his powers to stabilize wages and farm prices. However, his assertion that he would act if Congress did not, and his reliance upon powers *vested* within him, indicates that he, like Lincoln and Jefferson, believed in the existence of inherent presidential powers.

Harry Truman was yet another widely known proponent of inherent executive power. Though Truman's effect on the idea of inherent powers, specifically concerning the events surrounding *Steel Seizure*, will be discussed in greater detail later, it bears a brief mention at this juncture. In 1951, a dispute between the major steel companies and their employees led to a nationwide strike of steel workers.[46] After federal mediation tactics failed, President Truman, fearing that the strike would jeopardize the national defense, as steel was a major component of virtually all weapons, issued Executive Order 10340, directing the Secretary of Commerce to take possession of the vast majority of steel companies to keep them running.[47]

When the steel companies filed suit in federal court, the United States argued that even a brief disruption of steel production would jeopardize national security; therefore, the President had the inherent power to take the actions he did.[48] The United States went on to argue that this inherent power was "supported by the Constitution, historical precedent, and by court decisions."[49] Though the Supreme Court ultimately ruled against the government, Truman's actions mark an

41. *See* 88 CONG. REC. 7044, *supra* note 1.
42. *See id.*
43. *Id.*
44. *See id.*
45. *See generally* Emergency Price Control Act, 56 Stat. 765 (1942).
46. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 582 (1952).
47. *See id.*
48. *See id.* at 584.
49. *Id.*

important example of presidential assertion of inherent power.[50]

Though widely known for his arguments concerning executive privileges, Richard Nixon was a similarly vocal proponent of a presidential prerogative, though he espoused this support not during his presidency, but in the years following his resignation.[51] In Nixon's view, when the President decides that a particular action is in the best interests of the nation, by definition, that action is not illegal.[52] This way, the President's subordinates can carry out his orders without finding themselves acting contrarily to the law. To use the facts of *Steel Seizure* as an example, Nixon would argue that, by definition, the Secretary of Commerce was acting legally when he nationalized the steel mills. If such action were not legal *solely because it was ordered by the President*, the Secretary would have been placed in the unfortunate position of either disobeying the President, or acting contrary to the law. In order for the Secretary not to be caught in this legalistic catch-22, Nixon would argue, presidential orders must be legal solely by virtue of being presidential orders.[53]

*D. Pre-*ACLU *Case Law Concerning Inherent Powers*

Having given a brief discussion of various executive views about the existence of inherent presidential power, it now becomes useful to provide a short exploration of two Supreme Court cases prior to *ACLU* that have attempted to address the doctrine of presidential power: *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*)[54] and *Dames & Moore v. Regan*.[55]

1. *Steel Seizure*: Three Classifications of Presidential Action

One would be hard-pressed to find a legal scholar who was not thoroughly familiar with *Youngstown Sheet & Tube Co. v. Sawyer*, more commonly known as *Steel Seizure*.[56] The case is central to any

50. *See id.* at 589.
51. *See* Interview with Richard Nixon, *supra* note 28, at A16.
52. *See id.*
53. *See id.*
54. *See generally* Steel Seizure, 343 U.S. 579 (1952).
55. *See generally* Dames & Moore v. Regan, 453 U.S. 654 (1981).
56. Indeed, entire law review volumes have been dedicated to the effects of *Steel Seizure* upon current legal issues. *See generally* Ken Gormley, *Forward: President Truman and the Steel Seizure Case*, 41 DUQ. L. REV. 667 (2003); *President Truman and the Steel Seizure Case: A 50-Year Retrospective: Transcript of Video Interview Between Professor Ken Gormley and Chief Justice William H. Rehnquist*, 41 DUQ. L. REV. 681 (2003); Dr. Maeva Marcus, *Will Youngstown Survive*, 41 DUQ. L. REV. 725 (2003); David E. Feller, *Thoughts about the Steel Seizure Case*, 41 DUQ. L. REV. 735 (2003); Milton Kayne, *A View from Inside: Working with President Truman on the Steel Seizure Case*,

discussion of presidential action, and of particular importance when construing the inherent powers of the President. As the proposed framework of this Comment will utilize certain aspects of *Steel Seizure*, it warrants a thorough discussion at this juncture.

As previously mentioned, *Steel Seizure* arose during the height of the Korean War, in 1952.[57] Steel workers throughout America had not received a wage increase since 1950, which led to a dispute between steel companies and their employees in 1951.[58] Realizing the impasse between the two parties, the President referred them to the Federal Wage Stabilization Board, so that the Board could make findings and recommendations to help avert a strike and resume negotiations between the groups.[59] However, the steel companies rejected these suggestions, leading the steel workers to declare that they would soon strike.[60] Fearing that such a strike would endanger American lives and national security by paralyzing the steel industry, Truman authorized the Federal Government to nationalize the steel mills, thereby placing the steel industry under government control.[61] Specifically, Truman's order directed the Secretary of Commerce to take possession of the steel mills.[62] To accomplish this end, the Secretary ordered the presidents of the seized companies to serve as operating managers of the mills pursuant to his instructions.[63]

Though obedient to the orders of the Secretary, the steel companies filed suit in district court, arguing that a seizure of the companies was supported neither by congressional act nor constitutional provisions.[64]

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41 DUQ. L. REV. 751 (2003); Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3 (2002); Neal Devins and Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63 (2002); Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87 (2002); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002); Michael Stokes Paulson, *Youngstown Goes to War*, 19 CONST. COMMENT. 215 (2002).

57. *See* Gormley, *supra* note 56, at 667-68.

58. *See id.*

59. *See Steel Seizure*, 343 U.S at 582. Created by President Truman, the Federal Wage Stabilization Board existed in order to regulate wages and prices concerned with key industries throughout the Korean War, so as to prevent massive economic flux as a result of the war. *See* Gormley, *supra* note 40, at 667-68; *see also* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1st ed. 1977).

60. *See* Gormley, *supra* note 56, at 668.

61. *See id.* It is interesting to reflect upon the seemingly universal condemnation of Truman's action. National newspapers denounced the decision as "leaping socialism," going so far as to make comparisons between Truman and Hitler and Mussolini. *See id.* at 669.

62. *See id.* at 669.

63. *See Steel Seizure*, 343 U.S. at 583.

64. *See id.* at 583-84.

Therefore, they argued, the seizure was unconstitutional, and the court should issue permanent injunctions restraining enforcement of the orders.[65] Opposing these injunctions, the United States argued that "the President had inherent power to do what he had done—power supported by the Constitution, by historical precedent, and by court decisions."[66] The district court found against the government on all counts, finding "utter and complete lack of authoritative support" for the President's actions.[67] After the court of appeals stayed the order, the United States Supreme Court granted *certiorari*.[68]

In affirming the judgment of the district court, the Supreme Court held that if the President had power to issue the order to seize the steel mills, it must have been established through either the United States Constitution, or an act of Congress.[69] Not only were there no congressional acts granting such authority in these circumstances, such authority had previously been considered by Congress and explicitly rejected.[70] Similarly, no explicit grant of such authority was found in the Constitution.[71] The Constitution explicitly states that the legislative powers lie in the hands of Congress; the President exists to execute congressional policy in a manner described by Congress.[72] The Court found that Truman's order instead "direct[ed] that a presidential policy be executed in a manner prescribed by the President."[73] While Congress could certainly authorize such seizures in times of national emergency, the Constitution unequivocally states that such law-making powers are *solely* granted to Congress, not to be subjected to presidential control.[74]

While the majority opinion remains important for its apparent rejection of any inherent powers of the President, history has proven Justice Jackson's concurring opinion to be the most influential of the

65. *See id.*
66. *Id.* at 584.
67. Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 576 (D.D.C. 1952).
68. *See Steel Seizure*, 343 U.S. at 584.
69. *Id.* at 585.
70. *See id.* at 586. To reach this conclusion, the majority looked to the legislative history of the Taft-Hartley Act in 1947, finding that Congress had rejected an amendment to the Act that would have allowed for similar governmental seizures in times of emergency. *See id.* Though Justice Black makes a valid point, it is inherently fallacious to place much weight on congressional *rejection* of a certain measure or amendment. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983). Lack of congressional action can only say so much about Congress's thoughts on a particular issue. Bills and amendments are rejected for a plethora of different reasons, many of which may have nothing to do with explicit disapproval of the sort that Justice Black is alleging. *See id.*
71. *See Steel Seizure*, 343 U.S. at 587.
72. *See id.* at 588.
73. *Id.*
74. *See id.*

several opinions offered in the case.[75] At nearly four times the length of the majority, Justice Jackson's opinion proves immensely useful in determining the extent of presidential powers. Essentially, the opinion divides presidential action into three different categories: action pursuant to express congressional authorization; action with neither an express grant nor denial of congressional authorization; and, finally, action contrary to the express or implied will of Congress.[76] According to Justice Jackson, when the President is acting in accord with an express grant from Congress, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[77] When acting in this right, the President is granted the widest latitude for judicial deference; if his actions are found to be unconstitutional, it is the entire federal government, not specifically the President, who lacks power.[78] Justice Jackson went on to postulate that were the President's order to seize the steel mills accomplished pursuant to an act of Congress, its attackers would face an uphill battle in order to overcome the presumption of legitimacy.[79] Jackson contrasts this situation with the occasion where the President acts with neither explicit grant nor denial.[80] In these instances, the President must rely upon his own independent powers, though there is a slight area where his powers and those of Congress overlap.[81] The Justice hypothesizes that these instances will be judged on a largely case-by-case basis, dependent upon the variables of the particular events.[82]

Finally, Justice Jackson speaks of occasions when the President acts in a manner contrary to the expressed or implied will of Congress.[83] In such instances, he may only depend on his own constitutional powers, not including those explicitly granted to Congress in that area.[84] As such, courts may only sustain presidential authority at the expense of

75. *See generally* Hamdan v. Rumsfeld, 126 S. Ct 2749 (2006) (adopting Justice Jackson's concurring opinion from *Steel Seizure*); Dames & Moore v. Regan, 453 U.S. 654 (1981) (adopting Justice Jackson's concurring opinion from *Steel Seizure*).

76. *See Steel Seizure*, 343 U.S. at 636-38 (Jackson, J., concurring).

77. *Id.* at 635.

78. *See id.* at 636.

79. *See id.* at 637.

80. *See id.*

81. *See Steel Seizure*, 343 U.S. at 637.

82. *See id.* It is interesting to note that at this point in his concurrence, Justice Jackson cites to the myriad cases concerning President Lincoln's suspension of *habeas corpus* during the Civil War as examples of instances where a President was acting neither contrary to nor pursuant to congressional mandate. *See id.* at 637 n.3. As the Constitution states, *habeas corpus* may be suspended in certain circumstances, but it does not specify as to which branch or body may suspend it. Justice Jackson finds this to be an example of presidential action under the grouping. *See id.*

83. *See id.* at 637-38.

84. *See id.*

preventing congressional action in that particular arena.[85]

2. *Dames & Moore v. Regan*: Applying *Steel Seizure* to Carter's Response to a National Emergency

One of the predominant cases first applying *Steel Seizure* was *Dames & Moore v. Regan*, decided in 1981.[86] In response to the seizure of the American Embassy in Tehran in 1979, President Carter, acting pursuant to the International Emergency Economic Powers Act (IEEPA), declared a national emergency and "blocked the removal or transfer of 'all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . .'"[87]

In ordering the transfer of Iranian assets, the President cited five sources of express or inherent power to act.[88] However, when the actions were challenged in court, the government argued that the nullification and transfer orders were specifically authorized by the IIEPA.[89] The Supreme Court agreed, and, quoting *Steel Seizure*, held that as the President's actions in nullifying attachments and ordering the transfer of assets were pursuant to specific statutory authority, they were "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[90]

The Court was not so quick to approve the presidential suspension of legal claims, as such action was not specifically authorized by either the IEEPA or other statutory authority.[91] Instead, the Court found that the failure of Congress to delegate authority should not be taken to imply congressional disapproval of a particular action, especially in the areas of

85. *See id.* at 638.

86. *See generally* Dames & Moore v. Regan, 464 U.S. 654 (1981).

87. *Id.* at 663 (quoting Exec. Order No. 12170, 3 CFR 457 (1980)). In 1981, after the hostages were released President Carter went on to revoke all licenses "permitting the exercise of 'any right, power, or privilege' with regard to Iranian Funds, securities, or deposits; nullif[y] all non-Iranian interests in such assets" acquired after the 1979 order; and finally mandated banks holding Iranian assets to transfer them to the Federal Reserve. *Id.* at 665-66. These actions were undertaken in order to implement an agreement concerning the release of hostages and the settlement of United States claims against Iran. *See id.* at 665. President Reagan continued this implementation by suspending claims relating to Iranian assets that were currently pending in American courts. *See id.* at 675.

88. *See id.* at 669.

89. *See id.* at 670.

90. *See id.* at 674 (quoting *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring)).

91. *See id.* at 677.

foreign policy and national security.[92] Contrarily, congressional enactment of legislation closely related to the question of presidential authority that demonstrates intent to grant broad presidential discretion may be considered to "invite 'measures on independent presidential responsibility.'"[93] Previous statutes closely related to the presidential action similarly indicated that Congress had implicitly approved such action.[94] This previous approval, combined with the long-continued executive practice in this regard, a practice acquiesced to by Congress, led the Court to find that the presidential actions were constitutional.[95]

Essentially, such congressional acquiescence to presidential action places the action within the second category of Justice Jackson's framework. Though the actions are not pursuant to express congressional authorization, past congressional acquiescence to similar action will lend support to the action. Therefore, the validity of the action "hinges on a consideration of all the circumstances which might shed light on the views of [Congress]."[96]

III. *ACLU v. NSA*: A Definitive End to Inherent Powers?

In 2002,[97] President Bush authorized a secret program, known as the "terrorist surveillance program," (TSP) to intercept, without warrant, phone and internet communications conducted internationally.[98] The program targets communications involving at least one party outside of the United States, where the government "has reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda, or an affiliated terrorist organization."[99] No explanation is given as to what body decides whether the belief of terrorist involvement is reasonable.[100]

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92. *See id.* at 678 (citing Haig v. Agee, 453 U.S. 280, 291 (1981)).
93. *Id.* (quoting *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring)).
94. *See id.* at 680-81.
95. *See id.* at 681.
96. *Id.*
97. As the President's authorization and the communication intercept program are both secret, the specific date of the communication intercept program's inception is unknown. The Administration has acknowledged their existence and authorization at some point during 2002. *See* Press Conference of the President, http://www.whitehouse.gove/news/releases/2005/12/20051219-2.html. For a detailed legal defense of the secret program, *see* Prepared Statement of the Hon. Alberto R. Gonzales, Attorney General of the United States, http://judiciary.senate.gov/testimony.cfm?id=1727&wit_id=3936.
98. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (2006).
99. Gonzales, *supra* note 97.
100. *See generally id.* (thorough explanation of TSP fails to provide any details as to its supervision).

Plaintiffs brought suit, challenging the constitutionality of the TSP.[101] Plaintiffs regularly conducted international telephone and internet communications, for myriad legitimate reasons such as journalism, legal practice, and academic scholarship.[102] As many such communications occurred with Middle Eastern individuals, Plaintiffs alleged both that they were subjected to governmental interception of their communications and that the TSP had resulted in a chilling effect upon their constitutionally protected communications.[103] Foreign contacts would no longer speak with them, fearing repercussions of the governmental monitoring.[104]

In defending the suit, the government argued, among other things, that the ability to authorize the TSP fell within the inherent power of the President.[105] In an earlier statement given to the Senate Committee on the Judiciary, Attorney General Alberto Gonzales attempted to defend the TSP, asserting that "[t]he terrorist surveillance program is firmly grounded in the President's constitutional authorities. . . . Presidents have repeatedly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military. . . ."[106] Gonzales went on to say that federal courts have consistently upheld such practices, yet cited but a single case to demonstrate this supposed consistency.[107] The President's responsibility to protect the safety of the American public gives him the ability to intercept such transmissions, according to Gonzales.[108]

In her twenty-nine page opinion, District Judge Anna Taylor found that the TSP violated statutory law, the First and Fourth Amendments, and the separation of powers doctrine, and ordered a permanent injunction of the TSP.[109] In this lengthy opinion, Judge Taylor took the time to specifically address the government's argument concerning inherent power authority for the TSP: "[t]he Government appears to argue here that, pursuant to the penumbra of Constitutional language in Article II, . . . [the President] has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth

101. *See ACLU*, 438 F. Supp. 2d at 758.
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.* at 780.
106. Gonzales, *supra* note 97.
107. *See id.* (erroneously citing *In re* Sealed Case, 310 F.3d 717, 742 (U.S. Foreign Intelligence Surveillance Court of Review 2002) to demonstrate supposed consistency of federal approval of actions authorized by the President's inherent powers).
108. *See id.*
109. *See ACLU*, 438 F. Supp. 2d at 782.

Amendments of the Constitution itself."[110] She goes on to cite *Steel Seizure*, finding that when similar inherent powers arguments have been raised by the Government, the Court has held that "the President had been created Commander in Chief of only the military, and not of all the people, even in time of war."[111] While the President does have vast power to obtain foreign intelligence, as noted by Gonzales,[112] this power does not extend so far as to grant him immunity from Constitutional constraints.[113] No emergency can create previously unvested presidential power.[114]

IV. Analysis: Establishing a Framework for Inherent Powers

A. Introduction: Re-establishing the Question

While Justice Taylor's view of inherent presidential power—or, specifically, of the non-existence thereof—is in accord with the majority holdings of *Steel Seizure* and *Dames & Moore*, it flies in the face of the views of a substantial number of aforementioned Presidents and presidential advisors, including Jefferson, Lincoln, Roosevelt, Truman, and Nixon, as well as President Bush.[115] Despite *Steel Seizure* and its myriad citations with approval in the five decades since it appeared, Presidents continue to argue for the existence of inherent power. Though the Presidents frequently have legitimate reasons to act in such a manner, their inherent powers are continually asserted as further justification.[116]

So where does the notion of inherent powers stand at this juncture? May the President rely upon his inherent powers in order to approach what he believes to be a national crisis with a "shoot first, ask questions later" philosophy, as seems to be promoted by Jefferson, Lincoln, and Roosevelt? If not, is he prohibited from acting "in a moment of genuine emergency, when the Government must act with no time for deliberation," as suggested by Justice Souter in a 2004 concurrence as an instance where a President may sidestep the Bill of Rights in order to deter an "imminent threat to the safety of the Nation?"[117] In such cases,

110. *See id.* at 780.
111. *See id.* at 781.
112. *See* Gonzales, *supra* note 97 (attesting to the expansive power of the President to gather foreign intelligence).
113. *See ACLU*, 438 F. Supp. 2d. at 781.
114. *See id.*
115. *See Letter from Thomas Jefferson*, *supra* note 28; *see also* 88 CONG. REC. 7044, *supra* note 1; Monaghan, *supra* note 8, at 27; Marcus, *supra* note 59, at 116; Interview with Richard Nixon, *supra* note 28, at A16; Gonzales, *supra* note 97.
116. *See generally Dames & Moore*, 453 U.S. at 654.
117. Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring).

it would seem necessary that the President be able to swiftly act to avert disaster. This is a problem the remainder of this Comment will attempt to solve.

In order to solve this constitutional riddle, this Comment will develop a framework for understanding the inherent powers of the President. Applying the thoughts of various Presidents, as well as aspects of the reasoning of *City of Indianapolis v. Edmond*,[118] this Comment will set forth a test to be used when determining the constitutionality of presidential behavior, when the President acts in the absence of statutory or constitutional authority.

To better frame the issue, it is useful at this point to divide the inherent powers question into two separate inquiries. First, when is the President justified in acting solely on the basis of his inherent powers? Absent explicit congressional or constitutional authority, may he act whenever he deems it to be in the best interest of the nation, or is there a threshold that must be reached before action is justified? The second question is a corollary to the first: if such action is justified, when, and to what extent, may it infringe upon individual liberties?

B. A Threshold for Action: Imminent Threats to the Safety of the Nation

Prior to addressing the first question, it is useful to reflect on the categories of sources that have been addressed thus far in order to determine which will be most beneficial to the analysis. Generally, this Comment has explored three types of sources: presidential writings, case law, and independent political thoughts. Of those three, the ideas of the Presidents and the holdings of various cases will prove to be the most important in answering the first issue. The importance of the holdings is obvious: our legal system is largely based on the idea of precedent, with much of our current law being formed through judicial opinions.[119] The importance of the presidential thought is perhaps less immediately intuitive, but no less logical: throughout the history of the United States, only forty-two individuals have been placed in the position to best determine what action is truly in the best interests of the nation. The President and his predecessors are the only ones who have ever been in the position where the weight of the nation is literally upon their

118. *City of Indianapolis v. Edmond* is a seemingly unrelated but remarkably applicable Supreme Court case concerning the constitutionality of drug interdiction checkpoints. *See generally* Indianapolis v. Edmond, 531 U.S. 32 (2000).

119. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

shoulders. As such, their views must be accorded appropriate weight and deference.

Observing some of the similarities between presidential thought and case law can provide guidance at this point; if a consensus among these two categories of thought can be established, such consensus will be helpful in establishing a standard for the use of inherent powers. Jefferson believed that "the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation" than a strict adherence to established law.[120] Therefore, a President should not let the nation fall to ruin in order to obey current statutory law to the letter. Lincoln similarly believed that the national security was of greater importance than the strict adherence to law.[121] President Roosevelt believed the same, as demonstrated by his assertions that he would "take matters necessary to avert disaster" with or without congressional approval.[122] Finally, President Truman's seizure of the steel industry indicates his acquiescence to the notion that preserving the nation was more important than abiding strictly to statutory law.[123]

Apart from the similarity of the beliefs of those Presidents concerning inherent power, another similarity becomes readily apparent: with the exception of Jefferson, each President took action, or threatened to take action, in the face of a national emergency. Lincoln was in the midst of a horrendous civil war; if he delayed acting until he gained congressional approval, there was a significant chance that the nation would crumble.[124] Roosevelt was in the midst of World War II—winning the war was of the utmost priority to the security of the nation.[125] The same could be said of Truman's actions during the Korean War.[126] Thus, one may argue that under the thoughts of several Presidents, action may be taken under the guise of inherent powers in order to avoid an imminent threat to the safety of the nation.

However, the inquiry does not end here. We must now measure the beliefs of past commanders-in-chief against the doctrines established by case law. *Steel Seizure*'s majority broadly rejected this notion of inherent powers, regardless of the particular crisis facing the nation, when it held that Truman's power to seize the steel mills must have explicitly come from an act of Congress or the Constitution.[127] Judge

120. *Letter from Thomas Jefferson*, *supra* note 28.
121. *See* Monaghan, *supra* note 8, at 27.
122. 88 CONG. REC. 7044, *supra* note 1.
123. *See* MARCUS, *supra* note 59, at 80.
124. *See* Lincoln, *supra* note 1.
125. *See* 88 CONG. REC. 7044, *supra* note 1.
126. *See* MARCUS, *supra* note 59, at 11.
127. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 585 (1952).

Taylor found similarly in *ACLU*, when she held that there were no inherent powers apart from those derived from the Constitution.[128]

Though these opinions are not in accord with previously cited presidential authority, if studied closer, they do not actually foreclose all possibility of inherent powers. Both opinions state that any powers of the President must be found within the Constitution or congressional statute.[129] Unlike Article I, which explicitly lays out the scope of congressional powers, Article II begins: "The executive power shall be vested in a President of the United States of America."[130] It goes on to say that the President is the commander-in-chief of the army and navy.[131] With the exception of a few stated duties that the President must perform, the Constitution is largely silent as to the extent of his powers, other than to require a sworn statement that he will "preserve, protect, and defend the Constitution of the United States."[132] Therefore, other than his power as commander-in-chief of the armed forces, the President has no other powers explicitly granted by the Constitution. As such, rather than viewing *Steel Seizure* and *ACLU* to say that the President has no inherent powers,[133] they are perhaps more appropriately read as merely stating that the powers vested in the President by the Constitution do not contain the power to nationalize the steel industry or intercept electronic communications without a warrant.[134]

This alternate understanding of those holdings allows for a further thesis: the inherent powers of the President—those that necessarily follow from the power vested in Article II—may vary depending upon current exigencies facing the nation. That which is necessary to "defend the Constitution of the United States"[135] is surely different in peace time than in war time. This disparity would be even further increased if the nation were at war with *itself*, as it was during Lincoln's presidency, than if it were engaged in a foreign peacekeeping mission. As such, the powers necessarily granted to the President by the Constitution depend largely on the current climate of the nation.

This view follows both the previously mentioned presidential

128. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 781 (E.D. Mich. 2006).

129. *See Steel Seizure*, 343 U.S. at 587; *see also ACLU*, 438 F. Supp. 2d at 781.

130. U.S. CONST. art. II, § 1, cl. 1.

131. *See id.* at § 2, cl. 1.

132. *Id.* at § 1, cl. 8.

133. To clarify, this Comment previously defined "inherent powers" as those necessarily implied by various clauses of the Constitution; therefore, this statement may more accurately read "As such, rather than viewing *Steel Seizure* and *ACLU* to state that the President has no powers implicitly conferred on him by the Constitution."

134. *See generally Steel Seizure*, 343 U.S. 579; *ACLU*, 438 F. Supp. 2d 754.

135. U.S. Const. art. II, § 1, cl. 8.

thought, as well as the beliefs of various Supreme Court Justices. In his concurrence to *Steel Seizure*, Justice Jackson stated that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables."[136] Jackson went on to cite Lincoln's suspension of *habeas corpus* as one such example of where presidential power depended on the particular events facing the nation.[137] Justice Souter also would seem inclined to follow this notion, as he spoke in his concurring opinion in *Hamdi v. Rumsfeld* of certain exigent circumstances where the executive may have some emergency powers that would be unavailable at other occasions.[138]

Thus, it seems that both presidential and judicial authorities would agree that in certain emergency situations, the President may utilize powers inherent in his office that would not be available on other occasions. Therefore, the question now becomes: what circumstances would justify this extension of powers, and how far are they to be extended? Many instances questioning the authority of presidential action concern actions which infringe upon individual rights.[139] Therefore, any workable framework for inherent powers must be able to determine the circumstances under which inherent presidential power may violate constitutional protections.

C. City of Indianapolis v. Edmond: *Carving Out an Inherent Power Exception to Constitutional Rights*

In striking down inherent powers arguments in *ACLU*, Judge Taylor relied heavily on the intrusion of such powers upon individual freedoms.[140] Though judges and academics make sweeping statements concerning inviolate constitutional rights, the reality is that constitutional freedoms are not absolute; they are often limited by necessary circumstances.[141] If police officers are able to undertake an action

136. *See Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

137. *See id.* at 637 n.3.

138. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring).

139. *See* MARCUS, *supra* note 59, at 234 ("In [*Steel Seizure*], private individuals (the steel companies) had asserted that their property had been taken by the Executive without proper authority."); *see also* Dames & Moore v. Regan, 464 U.S. 654, 670 (1981) (President Carter's blocking removal of Iranian property within United States jurisdiction); *Ex parte* Milligan, 71 U.S. 2 (1866) (President Lincoln's suspension of *habeas corpus*); *ACLU*, 438 F. Supp. 2d. at 758 ("Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment . . . [and] their privacy rights, as guaranteed by the Fourth Amendment. . . .").

140. *See ACLU*, 438 F. Supp. 2d. at 781 (holding that the First, Fourth, and Fifth Amendments are fully applicable to Executive actions).

141. *See generally* Horton v. California, 496 U.S. 128 (1990) (acknowledging "plain view" exception to Fourth Amendment warrant requirement); United States v.

facially in violation of the Fourth Amendment, but are justified through the carving out of one of many judicial exceptions, it stands to reason that the President would have such a power during a national emergency. One such exception, relating to vehicle checkpoints set up by police, is readily applicable to inherent powers analysis.

Though facially unrelated, the constitutional issues addressed in *City of Indianapolis v. Edmond* are largely the same as those found in *ACLU*.[142] Both concern the Fourth Amendment protections of the Constitution, and in both cases, warrantless seizures were attacked and declared unconstitutional.[143] Specifically, *Edmond* concerned drug interdiction checkpoints on roadways.[144] At these checkpoints, officers would stop a predetermined number of cars, ask for the license and registration of the driver, and check for noticeable signs of driver impairment.[145] One officer would make an open-view examination of the vehicle from the outside, while another walked around the car with a drug-sniffing dog.[146] Two individuals stopped at one such checkpoint brought suit against the City of Indianapolis, alleging violations of their Fourth Amendment rights against search and seizure.[147]

Noting that a search or seizure is typically unreasonable in the absence of individualized suspicion of wrong-doing,[148] and that it was well-established that highway stops were seizures under the Fourth Amendment,[149] the Court looked to determine whether such a checkpoint nevertheless fell within one of the limited circumstances where the general rule did not apply.[150] Such circumstances included occasions where the particular practice attacked "was designed to serve 'special needs, beyond the normal need for law enforcement.'"[151] Checkpoints at

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Rabinowitz, 339 U.S. 56 (1950) (recognizing search incident to lawful arrest exception to Fourth Amendment warrant requirement); *see also* Miller v. California, 413 U.S. 15, 23 (1973) (holding that First Amendment protections do not apply to obscene material); Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting) ("No government . . . should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile.").

142. *Compare* Indianapolis v. Edmond, 531 U.S. 32 (2000) (finding that highway drug interdiction checkpoints violate the Fourth Amendment), *with ACLU*, 438 F. Supp. 2d at 782 (holding that warrantless wiretaps of international phone calls violate the Fourth Amendment).

143. *See Edmond*, 531 U.S. at 48; *see also ACLU* 438 F. Supp. 2d at 782.

144. *See Edmond*, 531 U.S. at 48.

145. *See id.* at 34-35.

146. *See id.* at 35.

147. *See id.* at 36.

148. *See id.* at 37.

149. *See id.* at 40.

150. *See id.* at 37.

151. *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

borders and driver intoxication checkpoints were among those cited by the Court as instances of programs serving such special needs.[152] Unlike those approved instances, the Court found that the checkpoint in question in *Edmond* was established merely to uncover evidence of ordinary criminal wrongdoing.[153] There was no special interest or purpose that the checkpoint was trying to serve. Therefore, absent individualized suspicion, such checkpoints were in violation of Fourth Amendment protections.[154]

Such analysis can easily be applied to the facts in *ACLU*. Both cases arose from alleged violations of Fourth Amendment protections. As previously mentioned, *ACLU* concerned warrantless intercepts of international phone and internet communications.[155] While there was some level of suspicion involved, as the TSP program required that there be reasonable governmental suspicion that one of the parties to the phone or email communication was an agent of al-Qaeda or affiliated terrorist organizations,[156] the lack of judicial protections (such as a warrant requirement) indicated that this "reasonable suspicion" need not approach the level of probable cause. As previously mentioned, the amount of suspicion actually required to be considered reasonable for the purposes of intercepting a communication is unknown.[157] This determination was to be made by government agents; however, "the Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."[158] Therefore, such searches are facially unreasonable without a warrant.

However, as acknowledged by *Edmond*, certain circumstances allow a warrantless search to be effected constitutionally. Plain view,[159] exigent circumstances,[160] searches incident to legal arrest,[161] automobile

152. *See id.* at 39 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 545-50 (1976) (holding that checkpoint served a border control function necessary to guard entire length of border) and Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 447, 450 (1990) (holding that checkpoint served purposes of detecting signs of intoxication and removing such motorists from the road)).

153. *See id.* at 42.

154. *See id.*

155. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).

156. *See* Gonzales, *supra* note 97.

157. *See id.*

158. *See ACLU*, 438 F. Supp. 2d. at 775 (quoting United States v. U. S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 317 (1972)).

159. *See generally* Washington v. Chrisman, 455 U.S. 1 (1982) (holding that seizure of a pipe and marijuana seeds from a student's dorm was constitutional as they were in plain view when the student let the officer into the room).

160. *See generally* Warden v. Hayden, 387 U.S. 294 (1967) (upholding warrantless entry and search of a house believed to hold a robber immediately following a robbery due to exigent circumstances).

searches,[162] and stop and frisk procedures[163] are all long-held exceptions to the general warrant requirements. Though the Fourth Amendment would seem to mandate warrants for all of those situations, the Supreme Court has held that for various reasons, warrants are not required to make such a search or seizure.

In *ACLU*, the Government attempted to assert that the inherent power of the President is another such exception, allowing government agents to violate Fourth Amendment protections.[164] Though the court struck down this argument, refusing to establish a *per se* exception to constitutional protections under the guise of inherent presidential powers,[165] the inherent powers argument is not entirely foreclosed. Judge Taylor, in *ACLU*, spoke of inherent powers largely in sweeping, grandiose terms; presumably, this style is in response to the sweeping terms used by the Government in defending the TSP.[166] However, according to earlier case law, it is not entirely accurate to speak of inherent powers in such terms. In his concurrence to *Steel Seizure*, Justice Jackson does not entirely foreclose the existence of inherent powers.[167] As stated previously, when speaking of presidential action in absence of either congressional grant or authority, Jackson finds that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables."[168] If anything, this statement seems to open the door to future arguments for presidential action independent of specific statutory authority. When taken together with the plethora of judicially established exceptions to Fourth Amendment protections, it seems reasonable to argue for a sort of "presidential exigent circumstances" exception to certain Constitutional protections. While such an exception certainly would not be so broad as to allow for seemingly any violation of the Constitution that the President viewed as necessary, the exception—if well-constrained—may allow for avoidance of Justice Souter's theoretical "imminent threat to the safety of the

161. *See generally* United States v. Watson, 423 U.S. 411 (1976) (upholding felony arrests without a warrant).

162. *See generally* California v. Carney, 471 U.S. 386 (1985) (upholding warrantless search of motor home as ready mobility of automobile justifies lesser degree of protection).

163. *See generally* Terry v. Ohio, 392 U.S. 1 (1968) (permitting a reasonable search of stopped individual for weapons for protection of officer with reason to believe individual is dangerous).

164. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 780 (E.D. Mich. 2006).

165. *See id.* at 781.

166. *See id.*

167. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 754, 637 (1952) (Jackson, J., concurring).

168. *See id.*

Nation."[169]

D. *Establishing the Framework: A Strict Scrutiny Approach*

Having demonstrated that such a framework of inherent powers could pass Constitutional muster, we now turn to the task of actually establishing the framework. When determining the constitutionality of warrantless searches and seizures in particular situations, the Supreme Court has been forced to balance individual rights with interests of crime control, safety of officers, protection of the public, and destruction of evidence, among other interests.[170] In *Terry v. Ohio*, the Court found that the safety of the officer when encountering a possibly dangerous individual outweighed the individual's absolute right against warrantless searches and seizures.[171] Thus, the limited invasion upon a suspect's rights was outweighed by the substantial threat to an officer's safety posed by what the officer believed could be a dangerous individual.[172]

The Court used similar reasoning in *Edmond*, when it found that vehicle checkpoints, when established for the purposes of general crime control, violated the Fourth Amendment.[173] In order to be constitutional, such checkpoints must be designed to effect special needs, more than general law enforcement.[174] Thus, the Court did not believe that general crime control reasons were significant enough to infringe upon a driver's Fourth Amendment rights. However, the special importance of getting an intoxicated driver off the road would outweigh the slight infringement of a limited stop; therefore, checkpoints for such purposes were found to be constitutional.[175]

This same balancing test may easily be applied to the circumstances of *ACLU*. The constitutional infringement in this case is large: the right to privacy has long been established as one of the most central tenets of the Fourth Amendment.[176] This right to privacy must be balanced against the purposes of the interceptions, and the governmental interest furthered by them.[177] The government based its communication interceptions on something called "reasonable governmental suspicion"

169. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring).
170. *See generally* California v. Carney, 471 U.S. 386 (1985); Washington v. Chrisman, 455 U.S. 1 (1982); United States v. Watson, 423 U.S. 411 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967).
171. *See Terry*, 392 U.S. at 27.
172. *See id.*
173. *See* Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).
174. *See id.*
175. *See id.* at 39 (citing Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 447, 450 (1990)).
176. *See generally* Katz v. United States, 389 U.S. 347 (1967).
177. *See id.*

that one party to the communication was affiliated with al-Qaeda.[178] Again, as the intercept program is confidential, it is unknown the level of suspicion necessary to be considered "reasonable" to secure a wiretap.[179] Nowhere in the known guidelines of the TSP is there anything about suspicion, or probable cause to find that a terrorist act will soon be committed, or that either party to the communication has knowledge of such an act.[180] Instead, all that is required is suspicion that one party is in some way involved in an al-Qaeda affiliated organization.[181] It is similarly unknown what is meant by the term "affiliation."[182] Must the individual have actually participated in an al-Qaeda bombing in ordered to be considered affiliated? Is it enough that he be related to, or live with, a documented member of such a group? As these questions cannot be answered by any known documentation of the TSP, the purposes of the warrantless communications intercepts of the TSP could justifiably be viewed as general crime control measures. As such, according to *Edmond*, the TSP's stated purposes would not outweigh the significant Fourth Amendment violation of the parties' rights to privacy.

Under this framework, in order for presidential action to be constitutional when not taken pursuant to explicit or implicit statutory approval, the interests served by the action must be something more than what *Edmond* calls "general crime control." While any executive supporter would be quick to label the prevention of terrorist acts as more significant than crime control, the background principles remain the same. The drug interdiction checkpoints were done solely to ferret out criminal activity; there was no further purpose served by them.[183] The same could be said of the wiretaps in *ACLU*. They were not undertaken to avert some impending national emergency; instead, they existed to gather intelligence to prevent future, theoretical attacks.[184] Thus, following the doctrine established by *Edmond*, the purposes of presidential action must be for something other than theoretical crisis prevention; the action must be taken to avert an imminent threat to the safety of the nation.

As such, when the president acts in a situation where he believes there to be an imminent threat to the safety of the nation, and violates individual rights for the public good, he will essentially place himself at

178. *See* Gonzales, *supra* note 97.
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.*
183. *See* Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).
184. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).

the mercy of the judiciary if his actions are challenged, akin to the manner suggested by Jefferson.[185] In such circumstances, the President's actions will be judged on the basis of the "imperatives of the events."[186] As with any alleged governmental infringement upon fundamental constitutional rights, the court will perform a strict scrutiny analysis of the President's action.[187] Under a typical strict scrutiny analysis, government action infringing upon constitutional rights may survive only if it is justified by a "compelling governmental interest" and "narrowly tailored toward the achievement of that goal."[188] However, due to the unique nature of the inherent power inquiry, the compelling governmental interest must be an imminent threat to the safety of the nation. Judges should take into account the type of threat faced, the risk to the safety of the country, and the necessity of immediate action when determining the imminence of the threat. Therefore, in order to survive such a challenge, presidential action, taken under the guise of inherent power, which violates constitutional rights must be justified by an imminent threat to the safety of the nation, and narrowly tailored to achieving the preventive goal.

When this framework is applied to past presidential actions justified by an assertion of inherent powers, it becomes apparent that, in many instances, nothing would have changed. The wiretapping at issue in *ACLU* would not have survived this imminent threat approach.[189] The electronic intercepts were undertaken purely for intelligence purposes; nowhere did the government argue that they were justified by any sort of threat to the nation.[190] As such, the imperatives of events did not justify infringing upon fundamental First and Fourth Amendment rights.[191]

Truman would certainly have been able to make a stronger case with the circumstances surrounding *Steel Seizure*, but it is still unlikely that he would have prevailed. Applying the framework, Truman would have had to demonstrate that there was an imminent threat to the safety of the nation, and that his actions were narrowly tailored to prevent this threat. In his case, the imminent threat to the safety of the nation was the

185. *See Letter from Thomas Jefferson*, *supra* note 28.

186. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

187. *See* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (arguing that strict scrutiny is limited to issues concerning fundamental constitutional rights).

188. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

189. *See* Gonzales, *supra* note 97.

190. *See id.*

191. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d. 754, 758 (E.D. Mich. 2006).

threat of a steel workers' strike during the Korean War.[192] Regardless of the justification for military action,[193] Truman believed that a shutdown of steel production would devastate the war effort.[194] Thus, the question becomes whether the threat of a strike during a foreign military conflict is significant enough to qualify as an imminent threat to the safety of the nation. The answer is likely to be in the negative. While the Korean War was viewed at the time to be a national emergency, the steel workers never actually went on strike because Truman's seizure preempted any cessation of labor.[195] Therefore, the effects of any strike on the war effort were purely speculative. Mere speculation is not significant enough to justify such dramatic action in order to survive imminent threat analysis.

Assuming, arguendo, that the threat of a steel workers' strike qualified as an imminent threat to the safety of the nation, Truman's action would likely be unable to survive the second prong of analysis: that it was narrowly tailored to achieving its preventative goal. The goal of Truman's action was to prevent a strike and persuade the disputing parties to resume collective bargaining sessions.[196] In accomplishing this end, he took arguably the most drastic measure possible—seizing private property.[197] This sweeping action certainly could not be considered narrowly tailored to the achievement of his goal; there were much less restrictive alternatives available to the President, such as continued collective bargaining and using procedures of the Taft-Hartley Act to obtain an injunction against the strike and force the workers to continue production while the dispute was settled.[198] Thus, as Truman's seizure was not narrowly tailored, it would have failed the second prong of the imminent threat analysis.

V. Conclusion: Where Do We Go from Here?

As neither Truman's actions prompting *Steel Seizure* nor Bush's

192. *See* MARCUS, *supra* note 59, at 74.

193. Though history has proven that communism was not the great threat the nation once believed it to be, the purported justifications for the military conflict do not affect its analysis as an imminent threat under the framework. Whether the war is fought to prevent the spread of communism, to prevent the invasion of an oil producing state, or to depose an unfriendly dictator, the important aspects for analysis remain such variables as the size of the conflict, its location (abroad or on American soil), the number of American troops committed to the encounter, and the likely results of victory or defeat, among other things.

194. *See* MARCUS, *supra* note 59, at 74.

195. *See id.* at 80.

196. *See id.*

197. *See id.*

198. *See id.* at 77.

actions prompting *ACLU* would have survived the imminent threat analysis, the following question will undoubtedly be raised: if this framework repeatedly reaches the same answer as the courts do already, why have it at all? The answer is remarkably simple. While the imminent threat framework will often reach the same negative conclusion concerning a President's exercise of power, its importance arises from its preservation of the notion of inherent power. Judges utilizing this analysis will not be able to make such sweeping statements as those made by Judge Taylor in *ACLU*.[199] While such flowery rhetoric reads well in an opinion, it proves dangerous because it can misconstrue the issue of inherent power. This Comment's framework will allow the judiciary to often reach similar conclusions concerning the exercise of executive power, but will prevent them from foreclosing the doctrine entirely. If a case arises where the safety of the nation is truly at risk, this framework will allow the President to act and give him the opportunity to justify his actions if they are later challenged.

There is little doubt that our nation will continue to face threats in the upcoming years, both at home and abroad. Though there has not yet been an instance where presidential action would survive an inherent threat analysis, it is undoubted that there eventually will be. When such a situation arises, the President should be in a position where he will not hesitate to do what is necessary to defend the nation. He must have the power, as Souter remarked, to deter an "imminent threat to the safety of the nation."[200] This framework can theoretically give him such power to be judged by the "imperatives of [the] events."[201] The modified strict scrutiny approach of the imminent threat analysis allows his actions to be objectively judged based on the particular circumstances of the threat. While the Executive will certainly have an uphill battle to meet this standard, it may be met in situations where the welfare of the nation is truly at risk. Though we surely hope a situation never arises that would truly justify the exercise of this power, we can take solace in the fact that in such a situation, when our nation is in its bleakest hour, the President will have the power to pull us through our darkest days.

199. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 781 (E.D. Mich. 2006) ("[T]he Constitution of the United States is a law for rulers and people, equally in war and peace.").

200. Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring).

201. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).